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MICHAEL RODAK, JR.,

In the Supreme Court
OF THE
United States

OCTOBER TERM 1972

No. 72-1274

BRUCE W. STILSON, et al., *Petitioners*

vs.

THE READER'S DIGEST ASSOCIATION, INC., a Delaware corporation, et al., *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This case does not present any substantial Federal question. Moreover, the points sought to be raised in this Court were either not raised below or were waived.

The California courts have merely applied their procedural rules governing class actions; there has been no denial of any right of privacy nor a denial of a forum within which petitioners can assert such rights.

QUESTIONS PRESENTED

The questions stated by petitioners (Petition, pp. 2-4) are inaccurate and redundant. Petitioners ignore the first question before this Court:

> 1. Whether the petitioners can properly raise for the first time in their petition for certiorari a question of procedural due process when that issue was available to them but not raised in the trial court, in the California Court of Appeal or on their petition to the California Supreme Court for a hearing?

The first five questions stated by petitioners should be restated as one:

> 2. Whether any substantial Federal question is presented by the decision of the California Court of Appeal declining, on the basis of facts disclosed by deposition, affidavits and admissions of record, to permit a class action when such an action would involve the litigation of separate questions by millions of members of the purported class and when the trial and appellate courts found that the action would impose an unjustified and intolerable burden upon the trial court and the parties?

We submit there is no basis in the decision of the court below or in the record for petitioners to even raise their purported questions 6 and 7 (Petition, p. 3). Petitioners advised that court, during oral argument, that they would not object to limiting the purported class to residents of California (Appendix to Petition, p. 6a) and the court assumed, for the purposes of its decision, that the as-

serted "exploitation" of a person's identity was actionable (Appendix to Petition, p. 4a).

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate and much of it is irrelevant to the questions sought to be raised. The basic facts are set forth in the opinion of the court below (Appendix to Petition, pp. 2a-3a).

On June 17, 1970, petitioners instituted an action on their own behalf and on behalf of all others similarly situated seeking damages and injunctive relief for the alleged use of their names and the names of the members of the purported class on mailings by respondents (CT 1-9).

Respondents filed special demurrers (CT 35-47) and a motion to strike the class allegation portions of the complaint (CT 48-51). Subsequently (three months after the filing of their complaint) petitioners moved for a preliminary injunction to enjoin respondents from (1) using the names of petitioners and of all members of the purported class and (2) altering, modifying or destroying records containing the names of all members of the purported class (CT 95-96). After evidence by affidavits and deposition was presented and the matter submitted at a hearing (RT 1-60), the trial court sustained the special demurrers in part, and struck the class-action allegations (Appendix to Petition, p. 8a). Petitioners' motion for a preliminary injunction was denied. The records containing the names of the members of the purported class were

no longer in existence at the time of the motion and petitioners declined a preliminary injunction for the protection of their individual names (Appendix to Petition, p. 9a).

The trial court found, on the basis of evidence presented to it by affidavits, deposition and admissions of record, that

> "the claim for relief consists of the aggregate of the claims of the individual members of the class, each one of which depends for its validity upon separate and unique facts. The result is that the major issues of basic liability and total damage cannot be determined without the appearance and separate proof of damages by each individual member of the class" (Appendix to Petition, p. 8a).

Petitioners at no time raised any issue of procedural due process before the trial court. They appealed from the decision of the trial court and again raised no issue of procedural due process.

The question of the right of the California court to pass on the rights of persons throughout the United States had been presented but not passed upon in the trial court (Appendix to Petition, pp. 8a-9a). In their oral argument on appeal petitioners conceded that, if they were permitted to proceed with a class action, they would limit the members of the class to California residents (Appendix to Petition, p. 6a).

The California Court of Appeal affirmed the trial court. It rejected an argument by petitioners that the class action was manageable on the theory that each of the persons petitioners purported to represent was entitled to

nominal damages. The court pointed out that even if each of those individuals was entitled to nominal damages, to award only nominal damages would limit the rights of the persons who may have been entitled to more than nominal damages:

> "[T]o award nominal damages, the court would be required to examine the mental and subjective state of each of the millions of plaintiffs, since in each case such individual appraisal is of the essence of the claim for damages and, indeed, of the cause of action" (Appendix to Petition, p. 6a).

Petitioners filed a petition for rehearing. The only reference to the United States Constitution mentioned in that petition was a description of the right of privacy as "guaranteed by the United States and California Constitutions" (Pet.Reh., p. 4)—a description which is consistent with the assumption by the court below that the unauthorized use of a person's name for commercial purposes is actionable (Appendix to Petition, p. 4a). When the petition for rehearing was denied, petitioners petitioned the California Supreme Court for a hearing. Again, the only reference to the United States Constitution in that petition was a reference to "the right of privacy guaranteed to individuals by the entire Bill of Rights in the Federal Constitution" (Pet.Hrg., p. 17).

ARGUMENT

I. THE FEDERAL QUESTIONS SOUGHT TO BE RAISED WERE NOT RAISED IN THE COURTS BELOW.

Petitioners did not raise any question of procedural due process in the trial court, in the California Court of Appeal or in the California Supreme Court.

Their purported excuse for failure properly to raise the Federal question in the state courts is an inaccurate assertion that the basis on which they claim a denial of procedural due process did not arise until the California Court of Appeal issued its opinion (Petition, p. 7). The trial court held that petitioners' action was not a proper class action because the issues could not be determined without separate proof of injury to individual members of the class (Appendix to Petition, p. 8a). This is precisely the ground upon which the Court of Appeal affirmed the trial court (Appendix to Petition, p. 6a) and it is the basis of petitioners' claim that they have been denied procedural due process. Under these circumstances, petitioners cannot raise the Federal question for the first time in this Court (*Whitney v. California* (1926) 274 U.S. 357, 362-363; *Cardinale v. Louisiana* (1969) 394 U.S. 437, 438-439; Stern and Gressman, Supreme Court Practice (4th Ed. 1969) § 3.27, pp. 125-126).

But, even assuming there were some colorable basis for petitioners' claim of surprise, they still cannot raise the issue for the first time in this Court. Petitioners had ample opportunity to assert their claim regarding procedural due process in their petition for rehearing in the California Court of Appeal and in their petition for hearing in the California Supreme Court. This they did

not do* and they cannot now raise it in this Court (see *Saunders v. Shaw* (1917) 244 U.S. 317; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951) § 78, pp. 134-135).

II. THE PETITION DOES NOT PRESENT ANY SUBSTANTIAL QUESTION OF DENIAL OF PROCEDURAL DUE PROCESS.

Point I of the petition (pp. 8-15) purports to raise questions of denial of procedural due process. Aside from the fact that these questions were not properly raised below, they present no substantial issue to this Court. The California courts merely held as a matter of state procedure that, regardless of the merit or lack of merit of petitioners' claims, their action was not a proper class action.

Petitioners cite no authority and we know of none that a hearing to determine the propriety of a class action cannot be based upon affidavits and depositions. The petitioners' quotation from *Boddie v. Connecticut* (1971) 401 U.S. 371, 377 (Petition, p. 11) does not suggest that a meaningful opportunity to be heard requires that every procedural determination be based upon a full trial.

The suggestion that "assumptions" by the California Court of Appeal foreclosed a meaningful hearing in a class action is not supported by the quotation (Petition, p. 11) out of context from the opinion below. The portion

*The only mention of the Constitution of the United States in either of petitioners' petitions below was a statement that the right of privacy is guaranteed by the United States Constitution (Pet.Reh., p. 4, Pet.Hrg., p. 17), a claim which is in no way inconsistent with the decisions of the California courts.

of the opinion from which that quotation was taken relates to the affirmance of the trial court's denial of a preliminary injunction. That affirmance was based on the fact that by the time the petitioners sought a preliminary injunction the names of the persons they purport to represent were no longer available and on the requirement that members of the class would have to be notified before their rights could be determined by the courts (Appendix to Petition, p. 7a). The court below simply did not agree with petitioners that everyone they purported to represent would or must concur with petitioners as to the nature of their interests or that those whose interests differed could have their rights arbitrarily limited.

Likewise, there is no basis for petitioners' assertions that the decision below denies petitioners access to the courts. The court below assumed, for purposes of determination of propriety of the class action, that each person petitioners purport to represent may have had a right to nominal damages. But as the court held, notice was necessary before their rights were limited to such damages. Petitioners' zeal to represent everyone does not justify sacrificing the rights of those persons who might claim more than nominal damages.

Access to the courts in accordance with California procedure is available to every member of the purported class; certainly there is no constitutional right to use the class action procedure regardless of the adverse consequences its use may have on the rights of the members of the purported class and on the maintenance of the court system.

III. NO CONSTITUTIONAL QUESTION AS TO THE NATURE OF THE RIGHT OF PRIVACY IS PRESENTED BY THIS CASE.

Point II of the petition (pp. 15-19) contains several quotations and citations discussing the nature of the right of privacy. We see no need to comment upon that material since nothing therein contained is inconsistent with the opinion of the California Court of Appeal which assumed that the "unauthorized use of one's name for commercial exploitation is actionable" (Appendix to Petition, p. 4a).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
April, 1973.

Respectfully submitted,
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